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Mailed: September 2, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Bare Escentuals, Inc.

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Serial No. 76436618

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Michelle J. Hirth of Sheppard, Mullin, Richter & Hampton LLP for  
Bare Escentuals, Inc.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office 111  
(Craig Taylor, Managing Attorney).

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Before Hairston, Holtzman and Drost, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Bare Escentuals, Inc. has appealed from the final refusal of  
the trademark examining attorney to register the mark TAKE TIME  
OFF for the following goods, as amended.<sup>1</sup>

"Cosmetic skin cream; lotions and gels, namely,  
facial lotion, shower gel, hair gel, age-retardant

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<sup>1</sup> Application Serial No. 76436618, filed August 1, 2002, based on  
applicant's assertion of a bona fide intention to use the mark in  
commerce.

gel, and eye gel; essential oils used as cosmetics, namely, essential oils for personal use; facial masks, namely, anti-aging masks; and cosmetic powders for the skin, namely, dusting powders and facial powders."

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the basis of Registration No. 1904881 for the mark TIME-OFF for the following goods:<sup>2</sup>

"Cosmetics; namely, foundation, face powder, concealers and skin care products; namely moisturizers, cleansers and toners."

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

The goods in this case are in part identical (i.e., facial powder) and otherwise closely related cosmetic products. Thus, the goods must be deemed to travel in the same channels of trade and be sold to the same classes of purchasers.

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<sup>2</sup> Issued July 11, 1995; Sections 8 and 15 affidavits accepted and acknowledged, respectively.

Applicant does not dispute the relatedness of the goods, but instead argues that the goods are not in the same channels of trade and "do not appear to target" the same purchasers. The basis for this argument is that, unlike registrant's goods, applicant's goods are only available through its retail "Bare Escentual" stores and the home shopping channel QVC and the QVC Internet website.

The question of likelihood of confusion is based on the goods as identified in the application and registration regardless of what applicant may claim, or the record may show, as to the actual channels of trade for the goods. See *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). There are no limitations as to channels of trade or classes of purchasers in either applicant's or registrant's identification of goods. Therefore, we must assume that applicant's as well as registrant's cosmetic products are sold through all normal channels of trade for those goods, including all the usual retail outlets, and that the goods reach all the usual classes of purchasers and users.

Thus, we turn our attention to the marks, keeping in mind that when marks would appear on identical or closely related goods, as in this case, the degree of similarity between the marks necessary to support a finding of likely confusion

declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

There are some differences in sound and appearance between TIME-OFF and TAKE TIME OFF. In particular, TAKE TIME OFF is three words, and TIME-OFF is two words joined by a hyphen. More important, however, there is a significant similarity; both marks contain the identical two-word phrase "TIME OFF." There is only one word difference in the two phrases, and that word is not sufficient to distinguish the marks. The differences in the marks become even less significant when we consider that, in relation to the goods, the meanings conveyed by the marks are substantially the same.

The meaning of a mark must be determined, not in a vacuum, but in relation to the goods to which it is applied because that is how the mark is encountered by purchasers. See Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895 (TTAB 1988). In relation to cosmetic products, TIME-OFF and TAKE TIME OFF have the same double meanings. They both suggest "taking" a rest or break and indulging oneself, although the hyphen makes this meaning a little less clear in registrant's mark. In any event, the other, more important meaning of these marks in the context of cosmetic products, and particularly facial cosmetics, is the suggestion that the products take "time" off one's face, that is, they restore a more youthful appearance. The addition

of the verb TAKE to applicant's mark in this context does not change the meaning or commercial impression of TIME-OFF, it simply reinforces it.

Thus, we find that the similarities in these marks far outweigh their differences especially when we consider that average purchasers are not infallible in their recollection of trademarks and often retain only a general overall impression of marks that they may previously have seen in the marketplace. See *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). The differences in these marks are not so significant that they are likely to be noted or remembered by purchasers when seeing these marks at different times on identical or closely related goods.

Moreover, contrary to applicant's contention, the term TIME-OFF appears to be a unique expression in the field of cosmetics. This is a factor which increases the likelihood of confusion. See *Century 21 Real Estate Corp. v. Century Life of America*, supra. There is nothing in the record to indicate that the registered mark is weak, or entitled to anything less than a normal scope of protection.<sup>3</sup> In addition, we note that cosmetics

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<sup>3</sup> In this regard, we note that applicant, for the first time on appeal, attached printouts of third-party registrations and Internet materials showing marks containing various combinations of the terms "take," "time" and "off" to support its claim that registrant's mark is weak and only entitled to a narrow scope of protection. Applicant had initially submitted a list of these registrations with its response to the examining attorney's first Office action. In her final action, the

are relatively inexpensive consumer items that are likely to be purchased casually and on impulse, thereby increasing the risk of confusion. *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985).

Accordingly, we find that consumers familiar with registrant's cosmetics sold under its mark TIME-OFF would be likely to believe, upon encountering applicant's mark TAKE TIME OFF for the same and closely related cosmetic products, that the goods originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register is affirmed.

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examining attorney timely and properly advised applicant that a list of registrations did not make the registrations of record and that, moreover, third-party registrations are not evidence of use. Thus, the examining attorney's objection to the registrations as untimely under Trademark Rule 2.149(d) is well taken as is her objection to the Internet evidence. Applicant's complaint in its reply brief that it had no opportunity to cure the deficiencies in the evidence is meritless. At any time during the six month period between the final refusal and the time for appeal, applicant could have filed a request for reconsideration of the final refusal accompanied by the appropriate evidence. See TMEP section 715.03. Applicant failed to do so. Consequently, neither the evidence nor any arguments relating to the evidence will be considered. Even if we were to consider this evidence, we would not find it persuasive. For one thing, none of the marks shown in the third-party registrations or Internet materials consist of or comprise the phrase "time off" or, for that matter, even contain both words. The existence of marks containing combinations of words other than "time off" has no bearing on whether the mark TIME-OFF is weak.